Supreme Court, U.S.
FILED
00 431 SEP 18 2000
OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

October Term, 2000

KINROSS COPPER CORPORATION, a foreign corporation,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Phillip D. Chadsey*
Jerry R. Fish
Michael R. Campbell
David E. Van't Hof
James N. Westwood
**Counsel of Record*
STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376
Counsel for Petitioner

September 14, 2000

3900

QUESTIONS PRESENTED

1. When an unpatented mining right protected by federal law is abrogated by a state regulation prohibiting discharge of nonpolluting mine waters, does a taking occur under the Fifth Amendment's Takings Clause?

2. Is a state regulation that prohibits the discharge of nonpolluting mine waters, and thus prevents an unpatented mining claim on federal lands from being developed, preempted by federal law?

3. Does takings jurisprudence require a property owner to show that it has a property interest in the very thing the state seeks to regulate, rather than merely showing that the effect of the regulation as applied to the petitioner denies it all economic use of a federally recognized property right?

4. Can a state court, under the guise of stating that the holder of an unpatented mining claim never had the right to appropriate water for the mine and, therefore, never had the right to discharge it as a part of its property right, thus avoid a "taking," when at common law it was not a nuisance for a miner to discharge nonpolluting mine waters into streams?

PARTIES TO THE PROCEEDING

The caption contains the names of all parties to this proceeding.

CORPORATE DISCLOSURE STATEMENT

Petitioner Kinross Copper Corporation is Nevada corporation and is a wholly owned subsidiary of Kinross Gold USA, Inc., which is also a Nevada corporation. Kinross Gold USA, Inc. is a wholly owned subsidiary of Kinross Gold Corporation, which is an Ontario, Canada corporation that is publicly held.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF CONTENTS iv

TABLE OF APPENDICES vi

TABLE OF AUTHORITIES vii

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 3

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

A. Procedural History 5

B. The Case 9

REASONS FOR GRANTING THE PETITION 11

I. This Case Involves Four Important Constitutional Questions That Should Be Resolved by This Court 12

Page

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal Courts 15

CONCLUSION 23

TABLE OF APPENDICES

Appendix	Document
A	5/19/99 Oregon Court of Appeals' Opinion, *Kinross Copper Corp. v. State of Oregon*, 981 P.2d 833 (1999)
B	10/13/99 Oregon Court of Appeals' Opinion on Reconsideration (affirming prior decision), *Kinross Copper Corp. v. State of Oregon*, 988 P.2d 400 (1999)
C	2/29/00 Oregon Supreme Court's Order Denying Review (No. S46982)
D	6/20/00 Oregon Supreme Court's Order Denying Reconsideration (No. S46982)
E	6/9/97 Multnomah County Circuit Court Letter Opinion (No. 9609-06900)
F	6/26/97 Multnomah County Circuit Court Order of Dismissal and Judgment (No. 9609-06900)

Appendix	Document
G	11/17/99 Kinross Copper Corp.'s Petition for Supreme Court Review
H	3/14/00 Kinross Copper Corp.'s Petition for Supreme Court Reconsideration
I	3/27/97 Multnomah County Circuit Court Stipulated Statement of Facts
J	40 C.F.R. § 440.104(b)(2)(i) (1999)
K	43 U.S.C.A. § 1712(c)(8) (West 1986)
L	Three Basin Rule, Oregon Administrative Rule, OAR 340-041-470 (as originally adopted)
M	Three Basin Rule, OAR 340-041-0470(1)-(7) as amended

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 12

Atchison v. Peterson, 87 U.S. (20 Wall.) 507 (1874) 11, 13

Belk v. Meagher, 104 U.S. (14 Otto) 279 (1881) 13

Benson v. City of Portland, 850 P.2d 416 (Or. App.), *rev. denied*, 862 P.2d 1304 (Or. 1993) 14

Best v. Humboldt Placer Mining Co., 371 U.S. 334 (1963) 13

Boise Cascade Corp. v. State of Oregon, 991 P.2d 563 (Or. App. 1999) 14

Bowles v. United States, 31 Fed. Cl. 37 (1994) 19

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572 (1987) 12, 20, 21

Carson v. Hayes, 65 P. 814 (Or. 1901) 13, 18

Dodd v. Hood River County, 855 P.2d 608 (Or. 1993) 14

Dolan v. City of Tigard, 832 P.2d 853 (Or. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994) 14, 25

First English Evangelical Lutheran Church v. County of Los Angeles, Cal., 482 U.S. 304 (1987) 22

Page

Florida Rock Indus., Inc. v. United States, 791 F.2d 893 (Fed. Cir. 1986), 18 F.3d 1560 (Fed. Cir. 1994) 20

Garbarino v. Van Cleave, 330 P.2d 28 (Or. 1958) 18

GTE Northwest, Inc. v. Public Util. Comm'n, 883 P.2d 255 (Or. App. 1994), *rev'd*, 900 P.2d 495 (Or. 1995), *cert. denied*, 517 U.S. 1155 (1996) 14

Harbison v. City of Hillsboro, 204 P. 613 (Or. 1922) 18

Hughes v. State of Washington, 389 U.S. 290 (1967) 15

Kinross Copper Corp. v. State of Oregon, 981 P.2d 833 (Or. App. 1999) . . . 1-3, 10, 11,15, 16, 19

Kinross Copper Corp. v. State of Oregon, 988 P.2d 400 (Or. App. 1999) 1, 11

Lambert v. City & County, 120 S. Ct. 1549 (2000) 15

Lincoln City Chamber of Commerce v. City of Lincoln City, 991 P.2d 1080 (Or. App. 1999), *petition for review denied*, 330 Or. 331 (Or. 2000) 14

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 3, 13-16, 18, 25

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 12, 19

Page

Provolt v. Bailey, 121 P. 961 (Or. 1912) 13, 18

Robinson v. Ariyoshi, 753 F.2d 1468 (9th Cir. 1985), *rev'd on other grounds*, 477 U.S. 902 (1986) 15

Skaw v. United States, 740 F.2d 932 (Fed. Cir. 1984), *cert. denied*, 488 U.S. 854 (1988) . . . 19, 20

State v. Campbell, 705 P.2d 694 (Or. 1985) 2

Stevens v. City of Cannon Beach, 835 P.2d 940 (Or. App. 1992), *aff'd*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) 14

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency, 34 F. Supp. 2d 1226 (D. Nev. 1999) 25

United States v. Locke, 471 U.S. 84 (1985) 13

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 12, 19, 20, 24

STATUTES AND RULES

28 U.S.C.A. § 1257(a) (West 1993) 2

33 C.F.R. part 330 (1999) 6

33 U.S.C.A. § 1341 (West 1986) 7

33 U.S.C.A. § 1344 (West 1986 & Supp. 2000) 6

36 C.F.R. § 228.8(b) (1999) 21

40 C.F.R. § 440.104(b)(2)(i) (1999) 4

Page

43 U.S.C.A. § 1712(c)(8) (West 1986) 4, 21

Clean Water Act, 33 U.S.C.A. § 1251, *et seq.* (West 1986 & Supp. 2000) 19

Mining and Mineral Policy Act of 1970, § 2, 30 U.S.C.A. § 21a (West 1986) 23

Mining Law of 1872, 30 U.S.C.A. § 22, *et seq.* (West 1986 & Supp. 2000) 5, 12, 20, 23

Or. Admin. R. 340-041-0470(1)-(7) (2000) . . 4-9, 18, 20-22, 24

Supreme Court Rule 10(b) 11

Supreme Court Rule 10(c) 11

U.S. Const., amend. V 2, 3, 9, 13, 14, 18

U.S. Const., amend. XIV 2, 9

U.S. Const., amend. XIV, § 1 3

U.S. Const., art. IV, § 3, cl. 2 3

OTHER AUTHORITIES

2 Samuel C. Wiel, *Water Rights in the Western States* § 1140 (3d ed. 1911) 17

Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) 15

Page

David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375 (1996) 15

James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735 (1993) 24

Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* § 10.07[A] § 10.07[A][2] (Supp. 2000) 19, 24

Joseph Novak, *The Legal Dilemma in Dewatering Mines*, 17 Rocky Mtn. Min. L. Inst. 657 (1972) 17

Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L.Q. 57 (1997) 25

PETITION FOR WRIT OF CERTIORARI

Petitioner Kinross Copper Corporation ("Petitioner" or "Kinross") respectfully petitions for a writ of certiorari to review a judgment of the decision of the Oregon Court of Appeals, affirming the Judgment of the Circuit Court for Multnomah County by the Honorable Henry Kantor, Judge.

OPINIONS BELOW

The decision of the Oregon Court of Appeals of *Kinross Copper Corp. v. State of Oregon*, is reported in 981 P.2d 833 (Or. App. 1999), and is reproduced as Appendix A ("App. A"). That court's opinion granting reconsideration and affirming its prior decision is reported in 988 P.2d 400 (Or. App. 1999) and is reproduced as Appendix B ("App. B."). The Oregon Supreme Court's order (SC No. S46982) denying Petitioner's petition for review, with two judges dissenting, is reproduced as Appendix C ("App. C"). The Oregon Supreme Court's order denying Petitioner's petition for reconsideration is reproduced as Appendix D ("App. D"). The letter opinion of the circuit court denying Petitioner's motion for summary judgment and granting the State of Oregon's cross-motion for summary judgment is reproduced as Appendix E ("App. E"). The circuit court's judgment and order of dismissal is reproduced as Appendix F ("App. F").

Petitioner's petition seeking review by the Oregon Supreme Court is reproduced as Appendix G ("App. G"). Petitioner's petition for reconsideration by the Oregon Supreme Court is reproduced as Appendix H ("App. H"). The stipulation of facts entered into by the parties and a part of the record for the cross-motion for summary judgment is reproduced as Appendix I ("App. I").

STATEMENT OF JURISDICTION

The order of the Oregon Supreme Court denying Petitioner's petition for reconsideration of its refusal to review the decision of the Oregon Court of Appeals was entered on June 20, 2000. (App. D.) This Court has jurisdiction in this matter pursuant to 28 U.S.C.A. § 1257(a) (West 1993), because the Oregon regulatory scheme as enforced by the Oregon court is repugnant to the Fifth and Fourteenth Amendments to the U.S. Constitution.

The Oregon Court of Appeals has held that Kinross has no entitlement to compensation under the takings clauses of either the state or federal constitutions. 981 P.2d at 834, 836. (App. A.) The court of appeals considered the state constitutional claim first. *See State v. Campbell*, 705 P.2d 694, 703 (Or. 1985). Having decided the claim adversely to Kinross, the court of appeals then had to address and decide the federal constitutional questions,

which had become dispositive of the action and which are the basis for this Court's jurisdiction.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The federal constitutional provisions at issue in this matter are the Property Clause and Fifth Amendment to the U.S. Constitution. U.S. Const., article IV, § 3, cl. 2, of the Property Clause provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

The Fifth Amendment provides, in pertinent part, as follows: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment provides, in pertinent part, as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const., amend. XIV, § 1.

---

[1] The court of appeals concluded that a water discharge right, and not the right to mine, is the "property" interest in this case (981 P2d at 837). Kinross has both rights, but complete removal of either one by state regulation effects a justiciable taking of property. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992).

STATUTORY AND ADMINISTRATIVE PROVISIONS INVOLVED

The water discharged from the mine would meet federal and state instream water quality standards, as well as discharge limits for mines promulgated by the U.S. Environmental Protection Agency under the federal Clean Water Act, *see* 40 C.F.R. § 440.104(b)(2)(i) (1999). This regulation is reproduced as Appendix J ("App J"). Federal law allows states to impose water quality standards for discharge on federal lands. 43 U.S.C.A. § 1712(c)(8) (West 1986). A copy of this statute is reproduced as Appendix K ("App. K"). However, the Oregon administrative rule at issue, Or. Admin. R. 340-041-0470(1)-(7) (2000) (known informally as the "Three Basin Rule"), prohibits all water discharges from any industrial source, regardless of water quality, to the North Santiam River Subbasin, in which the proposed mine would be located. A copy of the Three Basin Rule as originally adopted is reproduced as Appendix L ("App. L"), and a copy of that rule as amended is reproduced as Appendix M ("App. M").

STATEMENT OF THE CASE

A. Procedural History.

Petitioner is the lessee of an unpatented mining claims on U.S. Forest Service (the "USFS") lands that were obtained pursuant to the Mining Law of 1872, 30 U.S.C.A. § 22, *et seq.* (West 1986 & Supp. 2000). Petitioner's lessor in 1975 staked a number of mining claims in the Willamette National Forest (the "WNF"), and the following year it discovered a valuable copper ("Bornite") deposit on some of these claims. (App. I-1-2.) In 1977 the Oregon Environmental Quality Commission (the "EQC") adopted an administrative regulation, known as the Three Basin Rule, that prohibited all water discharges into streams within the North Santiam, McKenzie and Clackamas River Subbasins in western Oregon. (App. I-2.)

In June 1991, Petitioner, under its former name, submitted a Plan of Operations for the Bornite Project (the "Plan") to the USFS to develop the claims. (App. I-2-3). While the Plan was undergoing review by the USFS, Petitioner also submitted an application to the Oregon Department of Environmental Quality (the "DEQ") for a National Pollutant Discharge Elimination System ("NPDES") permit that would allow the Bornite Project to discharge groundwater pumped from the mine and other wastewaters into a surface stream adjacent to the Bornite

Project. (App. I-3.) (It is stipulated that all of the waters to be discharged from the mine would meet federal and state water quality standards and would otherwise comply with the federal Clean Water Act. (App. I-6.) Within the North Santiam River Subbasin, however, the Three Basin Rule prohibits all new industrial discharges, including discharges from mining operations, regardless of the quality of the water discharged.)

On April 22, 1993, the USFS Supervisor of the WNF adopted a Record of Decision and Final Environmental Impact Statement that approved the Bornite Project and recognized that the mine would be required to obtain an NPDES permit from the State of Oregon (the "State") to discharge mine waters into Cedar Creek, which is adjacent to the mine site. (App. I-3.)

On May 17, 1993, the U.S. Department of the Army, Corps of Engineers issued Petitioner a nationwide permit (the "NWP") pursuant to 33 C.F.R. part 330 (1999) and section 404 of the Clean Water Act, 33 U.S.C.A. § 1344 (West 1986 & Supp. 2000), authorizing placing fill material in two tributaries of Cedar Creek on the Bornite Project. The NWP was issued based upon the DEQ representation that the proposed Bornite Project would not violate state water quality standards. The DEQ found that if the conditions required by the Corps of Engineers were satisfied, the Bornite Project would comply with the requirements of the federal Clean Water Act and state water

quality standards. The DEQ also issued Petitioner an NPDES permit to discharge storm water from construction activities at the proposed mine and had issued a certification pursuant to section 401 of the Clean Water Act, 33 U.S.C.A. § 1341 (West 1986), that the mine would meet state water quality standards. However, at some point the issue was raised internally at the DEQ whether an NPDES permit to discharge any water from the mine would violate the Three Basin Rule, because on its face it prohibited all discharges without regard to water quality. The DEQ then sought an opinion from the Oregon Attorney General, who opined that the Three Basin Rule prohibited an NPDES permit for discharges within the three watersheds covered by the rule. The DEQ had previously issued approximately 75 NPDES permits for facilities within the three river basins, including the one to Petitioner for the discharge of storm water.

By December 1993, the DEQ had determined that an NPDES permit for the Bornite Project could be issued under which "there would be no measurable impact on the North Santiam River or the Little North Santiam River" but that it was prohibited from doing so because of the Three Basin Rule contained in Or. Admin. R. 340-041-0470(1). (App. I-4.) The director of the DEQ advised the EQC that Kinross required an NPDES permit in order to proceed with the mining project but that it could not do so under a literal reading of the Three Basin Rule. The DEQ recommended

that the EQC amend Or. Admin. R. 340-041-0470(1) because

> the [Three Basin] rule language is broad and effectively prevents the issuance of permits for any new facilities (including new facilities requiring storm water permits) regardless of the impact of the discharge. The rule may effectively preclude development and other activities in these areas that were not intended to be affected by the rule.

(App. I-4-5.) The EQC was further advised that the Three Basin Rule "prohibits development requiring a discharge permit, regardless of the impact on water quality. No exceptions are allowed. This rule, together with the requirements for storm water permits, may have the effect of precluding activities and land uses in these subbasins that were never intended to be precluded." (App. I-5.)

However, the EQC refused to change the Three Basin Rule to allow the DEQ to issue NPDES permits for new industrial waste discharges that did not adversely impact water quality, and the DEQ ultimately denied Petitioner's application for an NPDES permit on March 21, 1995. (App. I-8.) The EQC did amend the rule to allow nonindustrial discharges. The sole ground for denial was that Or. Admin. R. 340-041-0470(1) prohibits the issuance of NPDES permits for new industrial discharges within the North Santiam River Subbasin. Petitioner then took an administrative appeal of that order to the EQC.

On August 30, 1996, the EQC issued a final order adopting the hearings officer-recommended Findings of Fact, Conclusions of Law and Final Order denying Kinross an NPDES permit. (App. I-8.) The denial of an NPDES permit by the EQC was a final administrative action that prevented Petitioner from discharging groundwater and other mine waters into a surface stream.

B. The Case.

In October 1996, Petitioner commenced this action in the state circuit court alleging that the denial of the NPDES permit violated Petitioner's rights under the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment because Petitioner was prevented from developing its mining claims as the result of the administrative denial and was thus denied all economically viable use of those claims. In a second count, Petitioner alleged that the Three Basin Rule did not substantially advance any legitimate state interest. Based on the stipulation of facts (App. I), the circuit court granted the state's summary judgment and dismissed Petitioner's claims (App. E, F).

On appeal, the Oregon Court of Appeals affirmed the circuit court's dismissal of the case on the basis (1) that the denial of the NPDES permit did not deny Petitioner the right to mine its claims, but only denied it the right to

discharge water (even though it is a stipulated fact that because of heavy precipitation and high volumes of groundwater, the mine could not operate without an NPDES permit), and (2) that because it was never a part of Petitioner's bundle of property rights to appropriate water for the mine, Petitioner never had a right to discharge water from the mine; therefore, denying it an NPDES permit did not "take" anything. (App. A.) The Petitioner moved the court of appeals for reconsideration, which was granted, but the opinion was adhered to. (App. B.) Petitioner then petitioned for review by the Oregon Supreme Court, which was denied, with two justices dissenting. (App. C, G.) It then petitioned for reconsideration by that court, which was also denied. (App. D, H.)

The trial court decided the motion for summary judgment based on a theory that had not been argued by the state. 981 P.2d at 835-36. The court of appeals based its opinion on a different theory, *i.e.*, that Petitioner did not have the right to appropriate water for the mine as a part of its bundle of property rights, therefore the state could prevent it from discharging any mine waters without it constituting a taking of Petitioner's mining rights. This was a theory the state had also not argued before the court of appeals. *Id.* at 837. Further, the court of appeals was disingenuous in its opinion on reconsideration by stating that Petitioner had not contended that it had a common-law right to discharge nonpolluting mine waters when the matter

was originally before that court. 988 P.2d at 401. In both its opening and reply briefs Petitioner had cited to *Atchison v. Peterson*, 87 U.S. (20 Wall.) 507, 514-15 (1874), for the proposition that a miner had a common-law right to discharge mine water and that it had never been considered to be a nuisance to discharge such waters, even if it had some adverse impacts on downstream users. Appellant's Opening Brief at 18; Appellant's Reply Brief at 8. The court cited, but glossed over discussing, *Atchison* in its original opinion. 981 P.2d at 838.

REASONS FOR GRANTING THE PETITION

Supreme Court Rule 10(b) lists among the considerations governing review on certiorari the circumstance in which a state court of last resort has decided a federal question in a way that conflicts with the decision of a federal court of appeals. In this case the decision was rendered by a lower appellate court and the state court of last resort twice refused to grant review. (App. C, D.) Under Rule 10(c), a ground for review exists when a state court has decided an important question of federal law that has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. Both of these grounds for review are present in this case.

I. This Case Involves Four Important Constitutional Questions That Should Be Resolved by This Court.

The precedent established by the decision below opens the door wide to allow states to prevent mining on federal lands by simply denying the miner the right to discharge nonpolluting groundwaters and at the same time avoid having to pay just compensation for "taking" those mining claims. It also serves as a precedent for claiming that no taking occurs unless the very thing proscribed by government is identical to the property interest in question. This is directly contrary to this Court's position in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985), that it is "the effect of the denial" that gives rise to a taking. The issue is one of causation. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("whether a particular restriction will be rendered invalid by the government's failure to pay for any losses *proximately caused* by it depends," etc. (emphasis added)).

As will also be discussed below, if left to stand, a state will be able to use an environmental law to trump the federal Mining Law of 1872 by simply refusing to issue a water discharge permit. *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572 (1987).

This Court has long recognized that an unpatented mining claim is an interest in real property protected by the

Fifth Amendment to the U.S. Constitution that vests upon discovery of a valuable mineral deposit. *Belk v. Meagher*, 104 U.S. (14 Otto) 279, 283 (1881). Moreover, an unpatented mining claim is a property interest that, if taken by a government action, entitles the miner to just compensation for that interest. *United States v. Locke*, 471 U.S. 84, 86 (1985); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 335 (1963). Because the holder of an unpatented mining claim only has a property right to remove minerals, if it is prevented from mining, the claim holder is denied all economically productive use of its property. *Lucas*, 505 U.S. 1003.

Under *Lucas*, the state can only deny a property owner just compensation if the proscribed use would have been a public or private nuisance at common law. *Id.* at 1030.[2] The right of a miner to discharge nonpolluting mine waters from unpatented mining claims on federal lands predates statehood. *Atchison*, 87 U.S. (20 Wall.) 507. Further, the Oregon courts have also long recognized that the discharge of nonpolluting mine waters to a stream is not a common-law nuisance. *Provolt v. Bailey*, 121 P. 961 (Or. 1912); *Carson v. Hayes*, 65 P. 814 (Or. 1901).

---

[2] No taking occurs if "[t]he use of these properties for what are now expressly prohibited purposes [*e.g.*, discharge of groundwater] was *always* unlawful . . . ." 505 U.S. at 1030 (emphasis in original). Here, the discharge from unpatented mining claims was always *lawful*.

The opinion below is a part of a growing number of state law cases that seek to circumvent this Court's decision in *Lucas* by redefining the property right in question to say that it was not a part of the landowner's property interest to begin with, rather than determining whether the proposed action could have been enjoined as a common-law public or private nuisance. The Oregon appellate courts have consistently displayed hostility to this Court's Fifth Amendment takings jurisprudence by construing this Court's opinions as narrowly as possible, misconstruing them or circumventing them by reinterpreting the state's property law. *Dolan v. City of Tigard*, 832 P.2d 853, 855 (Or. App. 1992), *aff'd*, 854 P.2d 437 (Or. 1993), *rev'd*, 512 U.S. 374 (1994); *Stevens v. City of Cannon Beach*, 835 P.2d 940, 942 (Or. App. 1992), *aff'd*, 854 P.2d 449, 452-57 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994) (Scalia and O'Connor, JJ., dissenting); *Dodd v. Hood River County*, 855 P.2d 608, 614-15 (Or. 1993); *GTE Northwest, Inc. v. Public Util. Comm'n*, 883 P.2d 255, 257-59 (Or. App. 1994), *rev'd*, 900 P.2d 495, 501-04 (Or. 1995), *cert. denied*, 517 U.S. 1155 (1996); *Benson v. City of Portland*, 850 P.2d 416, 418-20, 425-26 (Or. App.), *rev. denied*, 862 P.2d 1304 (Or. 1993); *Boise Cascade Corp. v. State of Oregon*, 991 P.2d 563, 569-70 (Or. App. 1999) (petition for review by Oregon Supreme Court pending); *Lincoln City Chamber of Commerce v. City of Lincoln City*, 991 P.2d 1080 (Or. App. 1999), *petition for review denied*, 330

Or. 331 (Or. 2000); David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1438-42 (1996). Recent opinions by state courts circumventing this Court's takings jurisprudence is not limited to Oregon. *Lambert v. City & County*, 120 S. Ct. 1549 (2000) (Scalia, Kennedy and Thomas, JJ., dissenting from denial of certiorari).

State courts reinterpreting their property law in order to avoid a taking also presents the issue of judicial takings. *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring); Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990); *see also Robinson v. Ariyoshi*, 753 F.2d 1468 (9th Cir. 1985), *rev'd on other grounds*, 477 U.S. 902 (1986).

II. The Petition Should Be Granted Because the Decision Below Conflicts with Decisions of This Court and Other Federal Courts.

The decision of the Oregon Court of Appeals, which the Oregon Supreme Court twice declined to review, subverts this Court's language in *Lucas* that no taking occurs "'if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.'" 981 P.2d at 837 (quoting *Lucas*, 505 U.S. at 1027).

The proscribed use in this case is the discharge of nonpolluting mine waters into a surface stream. The test in

Lucas is whether the proscribed use could be enjoined as a common law public or private nuisance. If not, and if as a result the owner is prohibited from making any economically viable or productive use of his or her property, he or she is entitled to compensation for a taking.

Instead of focusing upon whether the discharge of nonpolluting mine water could be enjoined as a common law nuisance, the court of appeals held that there had been no taking because Petitioner's property interest in the mining claims did not include the right to appropriate water for a beneficial use under Oregon law. *Id.* at 839-40. The court's analysis is seriously flawed for a number of reasons. First, it is undisputed that Petitioner has the right to use up to 5,000 gallons of water per day without seeking an appropriation under Oregon law. *Id.* at 840. Second, there is no evidence that Petitioner could not obtain an appropriation for water in excess of that amount, if it needed one. However, an appropriation of water is not the issue. The issue is the discharge of excess water, which has always been governed by a different set of rules from water appropriations.

An article on mine dewatering describes the distinctions as follows:

> The legal principles applicable to mine dewatering cases are dependent initially at least upon whether there are competing claims to the proprietary use of the percolating waters. If the interceptor asserts a proprietary claim to such waters as against

> other proprietors or appropriators, the rules governing water rights will apply. If, however, the interceptor disclaims any interest in the waters and discharges the same solely for the purpose of ridding the mine workings of such waters, the rules governing the use of one's property will apply. . . . The [latter] has been referred to as a "drainage case" and the [former] a "water case" . . . .

Joseph Novak, *The Legal Dilemma in Dewatering Mines*, 17 Rocky Mtn. Min. L. Inst. 657, 665 (1972) (citation omitted).

This distinction applies in Oregon. Under Oregon common law, and consistent with the common law of all other state jurisdictions, Petitioner holds a right to drain water from its property. The principle was explained by an early commentator as follows: "The reasonable use being use of land (and not necessarily of water if the land may be used without the water), *then drainage is a proper purpose and a reasonable use of land where the land is thereby benefited.*" 2 Samuel C. Wiel, *Water Rights in the Western States* § 1140, at 1067 (3d ed. 1911) (emphasis added). The Oregon Supreme Court interpreted the rule to apply as follows:

> The rule that would best serve in this state, and tend to promote the interest of the people without causing undue hardship, would be to allow the owner of land to turn upon the land of an adjacent owner surface water in such quantities as would naturally drain in that direction by means of artificial drainage even

> though the flow of such water upon the lower tract is accelerated; due regard being observed for the interest of the adjacent owner so as to cause no unreasonable inconvenience.

Harbison v. City of Hillsboro, 204 P. 613, 618-19 (Or. 1922).

The Oregon Supreme Court reaffirmed the foregoing rule in *Garbarino v. Van Cleave*, 330 P.2d 28 (Or. 1958). The state stipulated in this case that Petitioner's drainage of water from its property would not result in any measurable pollution (App. I-6), so the proposed discharge clearly meets the common law test in that it will "'cause no unreasonable inconvenience'" to any other landowner. 330 P.2d at 30 (citation omitted). Accordingly, Petitioner, as a part of its property interest in unpatented mining claims, does have a common-law right of drainage that has been "taken" by imposition of the Three Basin Rule. *Accord Provolt*, 121 P. 961; *Carson*, 65 P. 814. An unpatented mining claim can only be used for one purpose; the state's denial of an NPDES permit has deprived the unpatented claims of all economically productive use as a mine, which constitutes a taking entitling Petitioner to just compensation under the Fifth Amendment. *Lucas*, 505 U.S. at 1027.

The second important issue that this Court needs to address is causation. The court below also took the position that there had been no taking because the subject rule

merely proscribed the discharge of mine waters but did not prohibit mining. 981 P.2d at 837. (It is a stipulated fact that the mine would have to discharge excess groundwater in order to operate (App. I-3).) That position is in conflict with this Court's opinion in *Riverside Bayview*, 474 U.S. 121. In that case, the landowner had been denied a permit under the Clean Water Act, 33 U.S.C.A. § 1251, *et seq.* (West 1986 & Supp. 2000), to fill in wetlands, and therefore it claimed a taking of its property. This Court stated: "Whether the denial of a permit would constitute a taking in any given case would depend upon *the effect of the denial on the owner's ability to put the property to productive use.*" *Riverside Bayview*, 474 U.S. at 127 n.4 (emphasis added); *see also Penn Central*, 438 U.S. at 124 ("proximately caused"); *Bowles v. United States*, 31 Fed. Cl. 37, 49 (1994) ("but for" test); Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* § 10.07[A], at 10-44 & § 10.07[A][2], at 10-48 (Supp. 2000).

This case also conflicts with two opinions of the U.S. Court of Appeals for the Federal Circuit. *Skaw v. United States*, 740 F.2d 932 (Fed. Cir. 1984), *cert. denied*, 488 U.S. 854 (1988), also involved unpatented mining claims on federal lands. In *Skaw*, the Federal Circuit held that because the newly enacted Wild and Scenic Rivers Act prevented mining along the St. Joe River in Idaho, miners with valid unpatented mining claims would be entitled to

just compensation for a regulatory taking based on the Fifth Amendment. *Florida Rock Indus., Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), 18 F.3d 1560 (Fed. Cir. 1994), is even more analogous to the present case. As in *Riverside Bayview*, the plaintiff in *Florida Rock* had been denied a Clean Water Act permit, which prevented it from mining limestone because removal of the rock left a hole in wetlands that filled with water causing "temporary pollution by turbidity which, however, would not be a menace to the drinking water." 791 F.2d at 895-96. The Federal Circuit held in the second appeal that a taking of the quarry property was caused by the Corp of Engineers' refusal to issue the permit. 18 F.3d at 1573. As in this case, the denial of a water pollution permit did not prevent the plaintiff in *Florida Rock* from mining, but it was not feasible to mine its property without one.

Riverside Bayview, *Skaw* and *Florida Rock* were all brought to the attention of both the Oregon Court of Appeals and the Oregon Supreme Court to no avail. The court of appeals ignored discussing them, and the Oregon Supreme Court refused to grant review.

A third important issue involves whether the federal Mining Law of 1872 preempts enforcement of the Three Basin Rule. This Court's opinion in *Granite Rock*, 480 U.S. at 580, 583, 593, involved a facial challenge to a state environmental law that imposed a state permit requirement on the operation of unpatented mining claims on federal

lands. In holding that the state law on its face was not preempted, this Court went on to state: "The line between environmental regulation and land use planning will not always be bright; for example, one may hypothesize a state environmental regulation so severe that a particular land use would become commercially impracticable." *Id.* at 587.

While the USFS requires miners within national forests to comply with state water quality standards, neither by statute nor regulation does federal law allow states to prohibit outright any water discharge from mining claims on federal lands. 43 U.S.C.A. § 1712(c)(8) (App. K); 36 C.F.R. § 228.8(b) (1999). Unlike *Granite Rock*, this case involves a prohibition that prevents mining of unpatented claims on federal lands; the Three Basin Rule not only makes mining "commercially impracticable," it makes it physically impossible. Such a prohibition is preempted by federal law.

Further, when the Three Basin Rule was amended shortly before the EQC issued its final order denying Petitioner an NPDES permit, it ceased to be an environmental rule and became a land use regulation. The amended Three Basin Rule proscribes new NPDES wastewater discharge permits for industrial applicants, but it expressly allows a number of other wastewater discharges, many of which may have substantial adverse effects on water quality. Nonetheless, the rule absolutely forbids wastewater discharges from Petitioner's mine, even though

it is stipulated that those discharges would meet state and federal instream water quality standards and other requirements under the federal Clean Water Act. It is only because the mine happens to lie within the North Santiam River Subbasin, one of the three basins subject to the Three Basin Rule, that DEQ refused to issue an NPDES permit for discharges from the mine.

Because the Three Basin Rule is preempted by federal law, Petitioner is entitled to compensation for a temporary taking under *First English Evangelical Lutheran Church v. County of Los Angeles, Cal.*, 482 U.S. 304 (1987).

CONCLUSION

Mining in the western United States has played a major role since the earliest days of settlement. Congress enacted the Mining Law of 1872 to encourage the development of minerals on public lands. The right to discharge nonpolluting mine waters has always been a part of a miner's property interest in unpatented mining claims, and from the earliest days it has never been considered either a public or private nuisance to do so. The lower courts' holding that a property owner must have an appropriation right in order to discharge excess water is of special importance in the western United States and inconsistent with more than 150 years of water law in those states.

In enacting the Mining and Mineral Policy Act of 1970, § 2, 30 U.S.C.A. § 21a (West 1986), Congress emphasized that an "economically sound and stable domestic . . . industr[y]" is important to both our economy and national security. A state should not be allowed to thwart that policy with impunity by preventing the discharge of nonpolluting waters from mining claims on federal lands and not having to pay just compensation for the minerals that cannot be mined.

This case is closely watched by the mining industry and other property owners that must be able to discharge excess groundwater in order to put their land to a beneficial

use. The precedent established by the Oregon courts that the state can stop all productive use of lands by simply denying the right to discharge nonpolluting waters into a stream can have very wide ramifications. Nor is the issue limited to the western United States. If there is no right to discharge nonpolluting waters, and the courts can disregard the nuisance issue, then cases such as *Riverside Bayview* involving the draining of wetlands also come into question. *See* Laitos, *supra*, § 8.02[E], at 8-23 to 8-24 (Supp. 2000).

A vocal segment of the population has become increasingly active in trying to stop all commercial activities on federal forest lands through the use of state regulations. The unwillingness of the EQC in this case to amend the Three Basin Rule to allow nonpolluting water discharges, while changing the rule to allow discharges from nonindustrial sources, is just one example of their efforts. That segment views mining, grazing and logging, all of which Congress has authorized can be done on federal forest lands, as harmful to nature. As one law professor has stated: "The natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it." James P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Envtl. L. 735, 737 (1993). That is also the view of the author of the article that the trial court relied upon in granting the state summary judgment and dismissing this case, which

even the state conceded and the court of appeals recognized was "at odds with 'traditional takings analysis.'" 981 P.2d at 836; *see* Michael Graf, *Application of Takings Law to the Regulation of Unpatented Mining Claims*, 24 Ecology L.Q. 57 (1997).

In reversing the Oregon appellate courts in *Dolan*, this Court had to remind them that "the Takings Clause of the Fifth Amendment [is] as much a part of the Bill of Rights as the First Amendment or Fourth Amendment . . . ." 512 U.S. at 392. Unfortunately it is a lesson the Oregon courts have not heeded. They and many other lower courts have been quick to take the words of this Court in *Lucas* "that the proscribed use interests were not part of his title to begin with" as creating new avenues for avoiding a taking, rather than analyzing whether the proscribed use was a common-law nuisance. 505 U.S. at 1027; *see Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 34 F. Supp. 2d 1226, 1251 (D. Nev. 1999). This Court needs to refocus all of the lower courts on the fact that if the proscribed use was not a common-law nuisance, the owner is entitled to compensation if he or she has been denied all economically productive use of his or her property interest.

Petitioner respectfully urges the Court to grant the Petition for Writ of Certiorari.

Dated this 14th day of September.

Phillip E. Chadsey*
Jerry R. Fish
Michael R. Campbell
David E. Van't Hof
James N. Westwood
**Counsel of Record*

STOEL RIVES LLP
900 SW Fifth Avenue, Suite 2600
Portland, OR 97204-1268
(503) 294-9376

Of Attorneys for Petitioner Kinross Copper Corporation